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In the Supreme Court of the United States

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 4–13) is reported in 2 F.Supp. 773.

JURISDICTION

The judgment of the court below was entered March 13, 1933 (R. 13). A motion to modify the opinion was overruled May 8, 1933 (R. 13). Petition for writ of certiorari was filed June 7, 1933 (R. 14). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

On February 19, 1923, petitioner filed a waiver of the period of limitation upon assessment and collection for the year 1917, extending said period to

March 1, 1925. On June 26, 1923, the Commissioner made an additional assessment against petitioner, admittedly valid under a prior waiver, and the assessment list attached to the Commissioner's certification contained a notation that a waiver was on file. The waiver of February 19, 1923, was signed by the Commissioner on April 7, 1930. The question presented is whether that waiver permitted the Commissioner to collect the additional assessment by means of a credit on June 28, 1924.

STATUTES INVOLVED

The applicable provisions of the revenue laws appear in the Appendix (*infra*, p. 10).

STATEMENT

The findings of fact of the Court of Claims are as follows:

On September 29, 1917, petitioner filed its income and profits tax returns for the fiscal year ending July 31, 1917 (R. 4). Certain additional assessments were made against petitioner for the year 1917 and were paid (R. 4). The petitioner filed its income and profits tax return for the fiscal year ending July 31, 1918, on October 28, 1919, and an additional return for the same year on June 19, 1919, and the tax shown due on such returns was duly assessed and paid (R. 4–5).

On February 19, 1921, petitioner filed a waiver of assessment for the year 1917, which was approved by the Commissioner on February 6, 1923 (R. 5). This waiver expired April 1, 1924 (R. 5).

On February 19, 1923, petitioner filed a waiver of assessment and collection for the years 1917 and 1918, extending the period to March 1, 1925 (R. 5). The Commissioner's signature to this waiver was subscribed by an authorized officer on April 7, 1930 (R. 6). On April 7, 1930, the Commissioner of Internal Revenue was Robert H. Lucas, and his term as Commissioner extended from June 1, 1929, to August 15, 1930 (R. 6).

In June 1923 the Commissioner made an additional assessment against the petitioner for the fiscal year ending July 31, 1917, and signed and certified this assessment on June 26, 1923 (R. 6). On the attached assessment list, a notation opposite the item pertaining to petitioner, contained the word "Waiver" (R. 6). No proof was offered as to what particular document the word "waiver" had reference (R. 6). The additional assessment for 1917 was reduced by a credit of an overassessment for the year 1916 and, as reduced, amounted to $20,757.14. Payment of it was demanded by the Collector on August 3, 1923 (R. 6).

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded (R. 6). At that time it was

the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim (R. 6).

On March 1, 1924, the Commissioner approved a schedule of overassessments which showed an overassessment in favor of petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07 and sent this schedule to the Collector for his action in accordance with directions appearing thereon (R. 6–7). After complying with the Commissioner's instructions, the Collector signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits certifying the application of $14,928.07 as a credit (R. 7). The Commissioner signed the schedule of refunds and credits on June 28, 1924, and transmitted to petitioner a certificate of overassessment of the above amount for the fiscal year ending July 31, 1918 (R. 7). The overassessment for the fiscal year ending July 31, 1918, applied as a credit, reduced the liability of petitioner for the fiscal year ending July 31, 1917, to $5,829.07 (R. 7). This last amount was paid, with accrued interest, on September 15, 1924 (R. 7).

On May 16, 1930, petitioner filed claims for refund for the fiscal years ending July 31, 1917 and 1918, each in the amount of $14,928.07, on the ground that said amounts had been illegally assessed and illegally collected after the statutory period of limitation, and there were no valid waivers on file with the Commissioner (R. 7).

This suit was begun by a petition filed in the court below May 20, 1930 (R. 1). The court dismissed the petition (R. 13).

ARGUMENT

The petitioner contends that the second waiver filed by it was ineffective to extend the period of limitation upon the collection of its 1917 taxes, because the Commissioner did not sign the waiver within the period of limitation, and did not sign it until after the passage of Section 1106 (a) of the Revenue Act of 1926, and Section 506 of the Revenue Act of 1928, *infra,* p. 11.

The present case does not involve the question whether a waiver is void if not signed by or on behalf of the Commissioner of Internal Revenue, because it is admitted that the Commissioner signed the waiver in this case. That question is now awaiting the decision of this Court on writ of certiorari to the Circuit Court of Appeals for the Third Circuit. *Burnet* v. *U.S. Refractories Corporation,* No. 20, October Term, 1933.

The petitioner's contention, therefore, presents the view that the validity of a waiver is to be judged as of the date when it is signed by the Commisioner, rather than the date when it is filed by the taxpayer. Section 250 (d) of the Revenue Act of 1921, *infra,* p. 10, in effect when the petitioner filed the waiver, placed no restriction upon the time within which the Commissioner's consent could be given. Petitioner supports its

view by reference to language appearing in a number of decisions (Br. in Support, p. 26). None of those cases involved the question presented here, and whatever language lends support to petitioner's contention seems to have been based upon the theory that a waiver is a contract, a supposition not now approved by this Court. *Stange* v. *United States*, 282 U.S. 270; *Aiken* v. *Burnet*, 282 U.S. 277, 281; *Burnet* v. *Railway Equipment Co.*, 282 U.S. 295, 298–299. As this Court said in *Stange* v. *United States*, *supra*, p. 276:

> As pointed out in *Florsheim Brothers, etc.* v. *United States*, 280 U.S. 453, 466, a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. * * *

From this we think it follows that the date of the Commissioner's signature is not of controlling importance with respect to the validity of the waiver, even though this Court may decide that the signature is required at some time in order to render effective the action taken pursuant to the waiver, *Mosier* v. *Goodcell*, 49 F. (2d) 391, 393, (S.D.Cal.); *National Piano Mfg. Co.* v. *Commissioner of Internal Revenue*, 11 B.T.A. 46, affirmed, 50 F. (2d) 310 (App. D.C.); cf. *Pantages Theater Co.* v. *Lucas*, 42 F. (2d) 810 (C.C.A. 9th), certiorari denied, 282 U.S. 890.

Furthermore, we think that in the circumstances disclosed in this case the signature of the Commissioner upon the waiver itself was not essential to its validity. The statute requires only that the Commissioner consent in writing, and it is not necessary that the consent of both the taxpayer and the Commissioner be evidenced on a single document. *Sabin* v. *United States,* 70 C.Cls. 574; *Eclipse Lawn Mower Co.* v. *United States,* 1 F. Supp. 768 (C.Cls.). In the case at bar the Commissioner signed and certified the additional assessment against the petitioner, and on the assessment list attached thereto, opposite the item pertaining to petitioner, was the notation "Waiver." At the time of this signature and notation, the disputed waiver was on file, and we think the court correctly held that the notation satisfied the requirement of the statute. *Eclipse Lawn Mower Co.* v. *United States, supra;* see G.C.M. 1682, VI–1 C.B. 110.

In any event, we contend that a taxpayer who filed a waiver upon which it seems fair to say that the Commissioner relied in delaying collection, and who accepted the benefits accruing from the delayed collection is not in a position to attack the validity of the waiver. *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703, 704 (C.C.A. 3d); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner of Internal Revenue,* 43 F. (2d) 782, 784–785 (C.C.A. 4th).

The case at bar does not raise the question presented in *Burnet* v. *Northern Coal Co.* and *Burnet*

v. *C. H. Sprague & Son Co.*, pending on writs of certiorari, Nos. 18–19, October Term, 1933; *Burnet* v. *Oswego & Syracuse Railroad Co.*, pending on writ of certiorari, No. 21, October Term, 1933; and *Burnet* v. *U.S. Refractories Corporation, supra.* Those cases present the question whether waivers executed after the expiration of the statute of limitations and after the enactment of Section 1106 of the Revenue Act of 1926, but prior to the effective date of the Revenue Act of 1928, are valid. In our view, the waiver involved in the present case was executed at the time it was filed by the petitioner, namely, February 19, 1923, and effectively extended the period for the collection of petitioner's 1917 taxes.

Even if petitioner's contentions concerning the validity of the waiver be assumed correct, we think there is no basis for recovery in this case. It is clear that the petitioner's action is based upon an account stated (R. 10). The account stated, when it exists at all in this type of case, is contained in the certificate of overassessment delivered to the taxpayer (*Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, 265; *Wm. J. Friday & Co., Inc.* v. *United States*, 61 F. (2d) 370 (C.C.A. 3d), and the liability on the account is predicated upon a balance arrived at in favor of the taxpayer. *Daube* v. *United States*, No. 634, October Term, 1932, decided May 8, 1933. But in the case at bar the findings show that the certificate of overassessment indicated a deficiency, rather than an amount to be

refunded (R. 7). There was no balance struck in favor of petitioner and, therefore, no amount which the Commissioner impliedly promised to pay. *Earle* v. *United States,* No. L-291, C.Cls., *Leisenring* v. *United States,* No. L-221, C.Cls., both decided June 5, 1933.

Petitioner specifies as error and assigns as a reason for granting the writ, a statement in the opinion of the court below, which petitioner believes is a reflection upon the propriety of petitioner's conduct or that of its attorneys. We do not think that this matter can appropriately be considered as a reason for the allowance of the writ, and we deem it proper to refrain from discussion thereof.

CONCLUSION

There appears to be no conflict of decisions. We submit that the decision of the court below is correct, and that the petition should be denied.

Respectfully submitted.

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FRANK J. WIDEMAN,
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J. R. FILLMAN,
Attorney.

JULY 1933.

APPENDIX.

Revenue Act of 1921, c. 136, Sec. 250 (d), 42 Stat. 227, 265, provides in part

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1926, c. 27, Sec. 1106 (a), 44 Stat. 9, 113, provides

The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but

shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U.S.C.App., Title 26, Sec. 1249.)

Revenue Act of 1928, c. 842, 45 Stat. 791, 870, 875, provides in part

SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

"(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

* * * * *

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

" (f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective ac-

cording to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

U.S. GOVERNMENT PRINTING OFFICE 1933